Supreme Court, U.S.
FILED

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No. 07-_____

In The
Supreme Court of the United States

JOANNA BAIDA,

Petitioner,

v.

FIRST UNUM LIFE INSURANCE COMPANY;
DIVERSIFIED AGENCY SERVICES
GROUP BENEFIT PLAN,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRITT OF CERTIORARI

TERESA S. RENAKER
JEFFREY GREG LEWIS
Counsel of Record
LEWIS, FEINBERG, LEE,
RENAKER & JACKSON, P.C.
1330 Broadway, Suite 1800
Oakland, CA 94612
(510) 839-6824

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the existence of a conflict of interest arising from a plan administrator's dual role as claim decision-maker and payor of benefits under an employee benefit plan governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq., alters the abuse of discretion standard of judicial review where the plan confers discretion on the administrator to determine eligibility for benefits and interpret the terms of the plan?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Joanna Baida respectfully petitions for a writ of certiorari to review the decision of the U.S. Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the U.S. Court of Appeals for the Ninth Circuit (App. 1-6) is found at 2007 WL 4467637 (9th Cir. Dec. 20, 2007). The Ninth Circuit denied rehearing on February 13, 2008 (App. 17.) The orders of the district court are found at pages 7 through 16 of the Appendix.

STATEMENT OF JURISDICTION

The U.S. Court of Appeals for the Ninth Circuit issued its decision on December 20, 2007, and denied rehearing on February 13, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132, as amended, provides in relevant part:

(a) A civil action may be brought –

(1) by a participant or beneficiary –

* * *

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

STATEMENT OF THE CASE

1. This case raises the frequently litigated but unresolved issue of the proper standard of judicial review of a benefits claim under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), where a plan administrator that has been granted discretion by the plan terms both decides the claim and, if it determines the claim is payable, pays the benefits from its own funds. This Court recently granted certiorari on the two components of this issue: (1) whether such an administrator acts under a conflict of interest; and (2) if it does, how that conflict of interest should be taken into account on judicial review of the benefits claim. *MetLife v. Glenn*, 128 S. Ct. 1117 (2008) (hereinafter "*Glenn*").

2. ERISA does not prescribe a standard of review for benefits claims under Section 502(a)(1)(B). In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), this Court held that the default standard of judicial review of such a claim is de novo. *Id.* at 115.

However, where the terms of a plan confer discretion on the plan fiduciary to interpret the plan terms or determine eligibility for benefits, judicial review is for abuse of discretion. *Id.* In reviewing for abuse of discretion, courts must take into account any conflict of interest affecting the fiduciary. "[I]f a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" *Firestone*, 489 U.S. at 115 (quoting Restatement (Second) of Trusts, § 187, Comment d (1959)). More recently, this Court explained, "In *Firestone Tire* itself, we noted that review for abuse of discretion would home in on any conflict of interest on the plan fiduciary's part, if a conflict was plausibly raised. . . . It is a fair question just how deferential the review can be when the judicial eye is peeled for conflict of interest." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 384 n. 15 (2002).

3. Ms. Baida was covered as a participant in the Respondent Diversified Agency Services Group Benefit Plan ("the Plan") by reason of her employment with Porter Novelli, a public relations division of Diversified Agency Services. The Plan is insured and administered by Respondent First Unum Life Insurance Company ("Unum"). Ms. Baida began receiving long-term disability benefits from Unum under the Plan in September 2000, after she left work due to systemic lupus erythematosus, a chronic autoimmune system disease. Unum terminated Ms. Baida's

benefits in June 2002 and upheld this determination on Ms. Baida's appeal. Ms. Baida filed suit under Section 502(a)(1)(B) to reinstate the benefits.

The district court reviewed Unum's decision for abuse of discretion. (App. 7-14.) Applying the standard of *Atwood v. Newmont Gold Co., Inc.*, 45 F.3d 1317, 1323 (9th Cir. 1995), the court held that although Unum operated under an inherent conflict of interest as the insurer and administrator of the Plan, Ms. Baida had failed to point to "material, probative evidence . . . tending to show" that Unum's conflict of interest had affected its decision on her claim. (App. 12-13.) Following a trial on the administrative record, the court determined that Unum had not abused its discretion in denying benefits. (App. 16.)

The Ninth Circuit affirmed. (App. 1-6.) The court noted Unum's "inherent, structural conflict of interest of both making decisions on claims and paying claims with its own funds," but held that the "existence of such a conflict does not change the district court's abuse of discretion standard of review." (App. 2.) The circuit court recognized that the district court's decision in this case pre-dated *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006) (en banc), which overruled the *Atwood* standard applied by the district court. (App. 5.) However, the court held that the district court's abuse of discretion review was sufficient under *Abatie* because "Baida has not shown material, probative evidence, beyond the mere fact of the apparent conflict, tending to show that Unum's self interest caused a breach of the administrator's

fiduciary obligations to Baida." (App. 5 (citing *Alford v. DCH Found. Group Long-Term Disability Plan*, 311 F.3d 955, 957 (9th Cir. 2002) (applying *Atwood*))). Finally, the court expressed its view that the district court had considered Unum's conflict at the summary judgment stage, implying that the district court was not required to consider the conflict at the trial stage. (App. 5.)

The Ninth Circuit denied Ms. Baida's petition for panel rehearing. (App. 7.) This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Standard of Review of Decisions by Conflicted Administrators Is a Significant and Recurring Issue That Has Generated Pervasive Confusion and Conflicting Results in the Lower Courts.

As the United States has demonstrated in its brief in *Glenn*, since *Firestone*, the circuit courts have split on two questions: (1) whether an administrator operates under a conflict of interest when it both decides claims and pays those that it approves; and (2) if a conflict exists under these circumstances, how to weigh the conflict in determining whether the fiduciary has abused discretion conferred on it by the plan. *See* Brief for the United States as Amicus Curiae in *MetLife v. Glenn*, 2007 WL 4613628, at *5 (filed Dec. 21, 2007) (hereinafter *Glenn* U.S. Brief). As noted above, this Court recently granted certiorari in

Glenn on both these questions. *Glenn*, 128 S. Ct. at 1117.

This case illustrates the confusion and conflict in the lower courts on these questions. While the Ninth Circuit acknowledged that Unum operated under an "inherent, structural conflict of interest," it placed the burden on Ms. Baida to show "material, probative evidence, *beyond the mere fact of the apparent conflict*," tending to show that the conflict affected Unum's decision on her claim. (App. 5 (emphasis added).) The circuits have reached contrary results as to whether such evidence is required to trigger consideration of a conflict of interest in reviewing the decision of an administrator with discretion. *See Glenn* U.S. Brief, 2007 WL 4613628, at *7-*9 (collecting cases). Because the court below required this showing, its decision conflicts with those of other circuits holding that a conflict of interest must be taken into account in every case where the claim decision-maker also must pay the claims it approves. *See id.* at *7 (collecting cases); *see also Abatie*, 458 F.3d at 969 (holding that conflict should be considered even in absence of "smoking gun" evidence). Certiorari should be granted to establish a uniform standard for reviewing the decisions of such "dual-role" plan administrators. *See Glenn* U.S. Brief, at *9 (stating that "the circuits are clearly in disarray on the issue"); *Glenn*, 128 S. Ct. at 1117.

II. The Standard Applied by the Ninth Circuit Is Contrary to *Firestone* Because It Fails to Weigh a Conflict of Interest as a Factor in Determining Whether an Abuse of Discretion Occurred.

Decisions like the one below directly conflict with this Court's decision in *Firestone* by placing on the plan participant a burden to show the effect of an administrator's conflict of interest on the handling of the participant's claim. As noted above, in *Firestone*, this court held that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, *that conflict must be weighed*" as a factor in determining whether there is an abuse of discretion. *Firestone*, 489 U.S. at 115 (emphasis added). Yet the court below and the First, Second, Sixth, and Seventh Circuits fail to weigh the conflict unless the participant shows that the conflict affected the decision on his or her claim. *See Glenn* U.S. Brief, at *8 (collecting cases).

Here, the court placed on Ms. Baida the burden to demonstrate the existence of evidence "beyond the mere fact of the apparent conflict." (App. 5.) That burden cannot be reconciled with the requirement of *Firestone* that a conflict of interest must be weighed in determining whether an administrator with discretion has abused that discretion. *See Abatie*, 458 F.3d at 966. Because a substantial minority of circuits enforce the requirement imposed on Ms. Baida below, certiorari should be granted to bring the law into

conformity with *Firestone* and ERISA's trust-law roots. *See Glenn* U.S. Brief, at *13-*16.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

TERESA S. RENAKER
JEFFREY GREG LEWIS
Counsel of Record
LEWIS, FEINBERG, LEE,
RENAKER & JACKSON, P.C.
1330 Broadway, Suite 1800
Oakland, CA 94612
(510) 839-6824

Attorneys for Petitioner

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOANNA BAIDA, Plaintiff-Appellant, v. FIRST UNUM LIFE INSURANCE COMPANY; DIVERSIFIED AGENCY SERVICES GROUP BENEFIT PLAN, Defendants-Appellees.	No. 05-56923 D.C. No. CV-03-09345-GPS MEMORANDUM* (Filed Dec. 20, 2007)

Appeal from the United States District Court
for the Central District of California
George P. Schiavelli, District Judge, Presiding

Argued and Submitted December 4, 2007
San Francisco, California

Before COWEN**, HAWKINS, and N.R. SMITH, Circuit Judges.

Joanna Baida ("Baida") filed suit against First Unum Life Insurance Company, et al. ("Unum") pursuant to the Employee Retirement Security Act of

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

1974 ("ERISA"), claiming she is entitled to long-term disability benefits under the Diversified Agency Services Group Benefits Plan ("the Plan"). After a bench trial, the district court entered judgment in favor of Unum. Because the parties are aware of the facts of this case, we do not recount them here. We have jurisdiction under 28 U.S.C. § 1291. Reviewing de novo the district court's choice and application of the standard of review to decisions by fiduciaries in ERISA cases, *Lang v. Long-Term Disability Plan of Sponsor Applied Remote Tech., Inc.*, 125 F.3d 794, 797 (9th Cir. 1997), we affirm.

The Plan contains an unambiguous grant of discretion to the fiduciary or administrator of the Plan to determine a claimant's eligibility for benefits. The district court therefore correctly reviewed Unum's decision to deny Baida's claim for an abuse of discretion. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989); *see also Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 963 (9th Cir. 2006) (en banc).

Unum's inherent, structural conflict of interest of both making decisions on claims and paying claims with its own funds does not compel de novo review. The existence of such a conflict does not change the district court's abuse of discretion standard of review. *See Firestone*, 489 U.S. at 115; *Abatie*, 458 F.3d at 967-68.

Baida's allegation of procedural violations also does not change the abuse of discretion standard of

review. *See Abatie,* 458 F.3d at 971. Courts should review de novo an administrator's decision to deny benefits "[w]hen an administrator engages in wholesale and flagrant violations of the procedural requirements of ERISA, and thus acts in utter disregard of the underlying purpose of the plan as well." *Id.* The record, however, demonstrates that Unum committed no "wholesale and flagrant" procedural violations that would have required the district court to review Unum's claims decision de novo.

The California Department of Insurance's ("CDI") "Letter opinion per CIC § 12921.9: Discretionary Clauses" and "Notice to Withdraw Approval and Order for Information" do not render the discretionary clause in the Plan unenforceable. An opinion letter "merely states the opinion of the insurance commissioner, and does not have the force of law." *Mixon v. Metropolitan Life Ins.,* 442 F. Supp. 2d 903, 908 (C.D. Cal. 2006) (citing *Baer v. Associated Life Ins. Co.,* 248 Cal. Rptr. 236, 238-39 (Ct. App. 1988)); *see also* Cal. Ins. Code § 12921.9(b) (An agency letter opinion is "*not* [to] be construed as establishing an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, rule, or *regulation,* as those terms are described in Sections 11340.5 and 11342.600 of the Government Code.") (emphasis added).

"Section 10291.5(b) sets forth the parameters within which the California Commissioner of Insurance may, in the exercise of her discretion, approve or disapprove insurance policies." *Firestone v. Acuson*

Corp. Long Term Disability Plan, 326 F. Supp. 2d 1040, 1050 (N.D. Cal. 2004); *see Peterson v. American Life & Health Ins. Co.,* 48 F.3d 404, 410 (9th Cir. 1995). That section does not grant beneficiaries the right to "reform the nature of his policy and obtain benefits for which he never bargained by engaging courts to second-guess the Commissioner's approval of the policy." *Acuson Corp.,* 326 F. Supp. 2d at 1050 (quoting *Peterson,* 48 F.3d at 410). "[S]ection 10291.5 does not enable plaintiff 'to maintain a private action against [the insurance company] to rewrite the terms of his policy'" and "does not empower this court to declare a certain portion of plaintiff's policy invalid or to unilaterally reform the terms and conditions of that policy." *Id.* (quoting *Peterson,* 48 F.3d at 410-11).

In addition, although the California Commissioner of Insurance may approve or disapprove insurance policies, the CDI's withdrawal of its approval of Unum's policy does not apply retroactively. *See Lundquist v. Continental Casualty Co.,* 394 F. Supp. 2d 1230, 1246-47 (C.D. Cal. 2005) (noting that "[v]irtually every court that has addressed the California [Department of Insurance's] Notice and its impact on the standard of review in ERISA cases has rejected the argument that the Notice entitles plaintiffs to a de novo standard of review" and that "the Notice does not purport to invalidate disability policies containing discretionary clauses retroactively") (internal citations omitted); *see also Mitchell v. Aetna Life Ins. Co.,* 359 F. Supp. 2d 880, 889 (C.D. Cal. 2005).

The district court correctly found that Unum did not abuse its discretion when it denied Baida's claim for benefits. The record shows that the district court allowed Baida and her counsel multiple opportunities to submit additional evidence, thoroughly reviewed and considered all new evidence, and conducted independent medical reviews of Baida's condition. Unum therefore engaged in an "ongoing, good faith exchange of information" with Baida. *See Jebian v. Hewlett-Packard Co. Employee Benefits Org. Income Prot. Plan*, 349 F.3d 1098, 1107 (9th Cir. 2003).

Abatie had not been decided at the time the district court made its decision here. The district court's review of Unum's decision, however, would have been sufficient under the more heightened, skeptical abuse of discretion review required by *Abatie*. *See Abatie*, 458 F.3d at 967-68 (holding that the abuse of discretion standard of review will be more skeptical when a conflict of interest or procedural violation is involved). Baida has not shown material, probative evidence, beyond the mere fact of the apparent conflict, tending to show that Unum's self interest caused a breach of the administrator's fiduciary obligations to Baida. *See Alford v. DCH Foundation Group Long-Term Disability Plan*, 311 F.3d 955, 957 (9th Cir. 2002). The district court also considered Unum's alleged conflict of interest when making its summary judgment decision.

Lastly, the district court did not err by adopting Unum's proposed findings of fact. A district court's adopted findings of fact are reviewed for clear error,

although "the wholesale and verbatim adoption of one party's findings requires us to review the record and the district court's opinion more thoroughly." *Silver v. Executive Car Leasing Long-Term Disability Plan*, 466 F.3d 727, 733 (9th Cir. 2006). The record demonstrates that the district court carefully considered the facts and circumstances of the case before adopting its findings of fact. Additionally, Baida has not demonstrated any clear error in the district court's factual findings. *Id.*

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION
CIVIL MINUTES – GENERAL

Case No. CV 03-9345 GPS (CWx) Date: April 28, 2005

Title: Joanna Baida v. First Unum Life Insurance Company et. al.

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PRESENT: THE **HONORABLE GEORGE P. SCHIAVELLI**, JUDGE

Krista Barrett	Not present
Courtroom Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
Not present	Not present

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

PROCEEDINGS: Plaintiff's Motion for Summary Adjudication on Standard of Review; Defendant's Motion for Summary Judgment (In Chambers)

The above entitled motions came before the Court on April 11, 2005. The Court heard argument and took the motions under submission. Having considered the pleadings as well as the arguments raised by counsel at the hearing, the Court orders as follows:

1) Plaintiff's motion for summary adjudication on standard of review is **DENIED**. In an ERISA denial

of benefits claim, the Court reviews an administrator's decision "under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility benefits or to construe the terms of the plan." *Kearney v. Standard,* 175 F.3d 1084, 1089 (9th Cir. 1999) *quoting Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 115, 103 L. Ed. 2d 80, 109 S.Ct. 948 (1989). Where the plan unambiguously provides the administrator with discretionary authority, the district court reviews the denial of benefits for abuse of discretion. *See Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan*, 46 F.3d 938, 944 (9th Cir. 1995).

The Unum policy at issue contains a discretionary clause. That clause provides: "[w]hen making a benefit determination under the policy, UNUM has discretionary authority to determine your eligibility for benefits and to interpret the terms and provisions of the policy." Def's Statement of Uncontroverted Facts ¶ 7; Shea Decl. Exh. 1 UASP00044. The same language appears again in the plan's "Certificate of Coverage." Pl's Response ¶ 7; Shea Decl. Exh. 1 UASP00020.

It is undisputed that this language is sufficient to confer discretionary authority with the Unum administrator as contemplated in *Firestone*. Nevertheless, Plaintiff argues that the a *de novo* standard of review should apply because (1) the discretionary language is found in the certificate and not the policy itself; (2) discretionary clauses violation California law; and (3) Unum's decision was tainted by a conflict of interest.

a. Certificate Language

Plaintiff concedes that language conferring discretion is found in certificate. However, Plaintiff contends that because discretionary language does not also appear in the policy itself, the policy somehow contradicts the certificate. *See* Pl's Mot. Summ. J. 4: 9-18. The certificate states that "[i]f the terms and provisions of the certificate of coverage (issued to you) are *different* from the policy (issued to the policyholder), the policy will govern." Shea Decl. Exh. 1 UASP00044, (*emphasis added*).

Here, however, Plaintiff does not argue that the terms of the policy are different from the certificate. Instead, Plaintiff contends that policy is silent as to any grant of discretion and thus the policy's silence contradicts the discretionary language in the certificate rendering such language invalid. The Court disagrees. The certificate is clear in that terms of the policy prevail over terms of the certificate only if such terms are different. The Court is not persuaded by Plaintiff's argument that silence is equivalent to difference. Moreover, the Court finds the certificate language sufficient to give the employee adequate notice that the administrator has discretionary authority. Plaintiff points to nothing in the policy to suggest possible confusion or contradictory language. Thus, the language in the certificate is sufficient to confer discretionary authority to the administrator.

b. California Law

Plaintiff further argues that the Court should not apply an abuse of discretion standard because the Unum policy's discretionary clause violates California law. Pl's Mot. Summ. J. 21: 24-28. In support of this position, Plaintiff relies on a recently issued legal opinion by the Chief Counsel for the California Insurance Commissioner, which questions the validity of discretionary clauses under California law.

On December 5, 2003, Plaintiff's counsel, Teresa S. Renaker requested a letter opinion in an unrelated case pursuant to California Insurance Code § 12921.9. See Def's Request for Judicial Notice Exh. C. Specifically, Renaker asked whether discretionary clauses in disability insurance policies were "appropriate under California law." *Id.* The particular clause in question was the same Unum discretionary clause at issue in this case. *Id.*

On February 26, 2004, the Department issued a letter opinion stating that "all ... discretionary clauses in disability insurance contracts violate California law and deprive insureds of protections to which they are entitled." *See* Def's Req. J. Not. [sic] Exh. C. The letter opined that the mere presence of a discretionary clause renders the contract "unintelligible, uncertain, ambiguous, abstruse, and likely to mislead." *Id.* The Department further stated that it would "withdraw any approval of any disability forms known to contain such discretionary clauses"

pursuant to California Insurance Code §§ 10291.5(f) and 12957. *Id.*

One day later, on February 27, 2004, the Department issued a "Notice to Withdraw Approval" ("NWA") in which the Insurance Commissioner states that he "withdraws any approval of the forms listed [therein] for the reason that the forms contain Discretionary Clauses, "effective 91 days after the mailing of [the] notice unless, within 30 days of the mailing of [the] notice, an adversely affected insurer requests a hearing." *See* Def's Req. J. Not. [sic] Exh. D. The Department listed five insurers to which the NWA was directed, one of which was Unum Life Insurance Company Forms. *See Id.*

However, the NWA does not appear relevant to this proceeding because the Department's revocation of Unum policies is prospective only. *See Washington*, 2004 U.S. Dist. LEXIS 22975, 50-51 *citing Firestone v. Acuson Corp. Long Term Disability Plan*, 326 F. Supp. 2d 1040, 2004 U.S. Dist. LEXIS 12247 at *24 (N.D. Cal. July 2, 2004) (citing Cal. Ins. Code § 10291.5(f)). In other words, the NWA informs insurers that they may no longer sell a particular policy form; it does not effect policies already sold. See Def's Request for Judicial Notice Exh. E. The Unum disability policy at issue was sold long before the issuance of the February 27, 2004 NWA. Consequently, Plaintiff has not demonstrated that the Department's letter opinion requires the Court to apply de novo review in the case.

c. Conflict of Interest

Plaintiff argues that assuming the policy grants discretionary authority, Unum's decision was tainted by its financial conflict of interest, thus requiring the Court to conduct de novo review of the decision. *See* Pl's Mot. Summ. J. 6: 6-11. "[I]f a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" *Firestone Tire & Rubber Co.*, 489 U.S. at 115 *quoting* Restatement (Second) of Trusts § 187, Comment d (1959). The Court must apply "'heightened scrutiny' where the plan administrator has a conflict of interest by virtue of its economic stake in the benefit decisions which it makes." *Atwood v. Newmont Gold Co., Inc.*, 45 F.3d 1317, 1322 (9th Cir. 1995) *citing Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1524 (9th Cir. 1993)).

An apparent conflict exists in this case because the insurance policy is both funded and administer [sic] by Unum. *See* Pl's Mot. Summ. J. 6-7: 28-5. However, "[t]he showing of a conflict does not automatically eliminate the usual deference accorded to the plan administrator; rather, the plaintiff must show 'that the conflict may have influenced the decision.'" *Alford v. Dch Found. Group Long-Term Disability Plan*, 311 F.3d 955, 957 (9th Cir., 2002) *citing Lang v. Long-Term Disability Plan of Sponsor Applied Remote Tech., Inc.*, 125 F.3d 794, 798 (9th Cir. 1997). "To make such a showing, the affected

beneficiary must come forward with 'material, probative evidence, beyond the mere fact of the apparent conflict, tending to show that the fiduciary's self interest caused a breach of the administrator's fiduciary obligations to the beneficiary." *Id.* (citations omitted).

Plaintiff points to a number of factors in support her contention that Unum was operating under a conflict of interest. Plaintiff argues, among other things, that the Unum neglected to follow its claim manuals and failed to give the proper weight to the opinions of Plaintiff's treating physicians. Plaintiff further argues that Unum's physician was biased and that Unum analyzed her ability to return to work under the wrong occupational title. However, these arguments do not persuade the Court that a conflict of interest may have influenced Unum's decision to deny benefits. Accordingly, the Court **DENIES** Plaintiff's motion for summary adjudication on the standard of review. Per the discretionary clause found in the policy at issue, the Court reviews the denial of benefits for abuse of discretion. *See Mongeluzo,* 46 F.3d at 944.

2) Defendant's motion for summary judgment is **DENIED**. The Court finds there to be triable issues as to whether the administrator abused its discretion in denying benefits to Plaintiff. As noted, the Court will apply an abuse of discretion standard and will therefore limit review to the record before the plan administrator when making the benefits determination. *Alford v. DCH Foundation Group Long-Term*

Disability Plan, 311 F.3d 955, 957 (9th Cir. 2002) *citing Taft v. Equitable Life Assurance Society*, 9 F.3d 1469, 1471 (9th Cir. 1993).

The Court trial, originally set for April 19, 2005, is hereby **continued to June 28, 2005 at 9:00 a.m.**

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION
CIVIL MINUTES – GENERAL

Case No. CV 03-9345 GPS (CWx)

Date: September 1, 2005

Title: Joanna Baida v. First Unum Life Insurance Company et. al.

==========

PRESENT: THE **HONORABLE GEORGE P. SCHIAVELLI**, JUDGE

Krista Barrett	Not present
Courtroom Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
Not present	Not present

PROCEEDINGS: Court Trial on Administrative Record (In Chambers)

The issue in this case is whether Plaintiff is entitled to long-term disability benefits under the Plan provided by her employer and insured by Defendant. Plaintiff filed a motion for summary judgment on the standard of review. The Court denied the motion concluding that the discretionary clause contained in Defendant's policy is sufficient to confer discretionary authority with the administrator. Accordingly, the Court reviews the denial of benefits on an abuse of discretion standard. *See Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan*, 46 F.3d 938, 944 (9th Cir. 1995).

On June 28, 2005, the Court conducted a trial on the administrative record, at the conclusion of which the Court took the matter under submission. Having considered the evidence, as well as the arguments raised at trial, the Court finds that Defendant presented sufficient expert testimony to support its position that Plaintiff is not disabled under the terms of the Plan. While the Court has serious questions regarding whether Plaintiff is permanently disabled, the Court concludes that the administrator did not abuse its discretion in denying benefits. Accordingly, the administrator's decision must be affirmed.

Defendant is ordered prepare and submit proposed findings of facts, conclusions of law, and judgment not later than September 16, 2005.

Initials of Deputy Clerk /s/ KB

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOANNA BAIDA, Plaintiff-Appellant, v. FIRST UNUM LIFE INSURANCE COMPANY; DIVERSIFIED AGENCY SERVICES GROUP BENEFIT PLAN, Defendants-Appellees.	No. 05-56923 D.C. No. CV-03-09345-GPS Central District of California, Los Angeles ORDER (Filed Feb. 13, 2008)

Before: COWEN,* HAWKINS, and N.R. SMITH, Circuit Judges.

The Appellant's petition for panel rehearing is DENIED.

* The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

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(2)

No. 07-1232

FILED

JUN 16 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

JOANNA BAIDA,

Petitioner,

v.

FIRST UNUM LIFE INSURANCE COMPANY; DIVERSIFIED AGENCY SERVICES GROUP BENEFIT PLAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DONALD J. SAPALA
FIRST UNUM LIFE INSURANCE COMPANY
1 Fountain Square
Chattanooga, TN 37402
Telephone: (423) 294-4479

MARK E. SCHMIDTKE
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
20 South Clark Street
Chicago, IL 60603
Telephone: (312) 558-1220

Counsel for Respondents

EDITH SANCHEZ SHEA
Counsel of Record
BURKE, WILLIAMS & SORENSEN, LLP
444 South Flower Street
Suite 2400
Los Angeles, CA 90071-2953
Telephone: (213) 236-0600

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESPONDENTS' BRIEF IN OPPOSITION

Neither of the arguments set forth by Petitioner supports certiorari review and no basis for certiorari is presented by this case. First, Baida's argument that the Ninth Circuit's decision is not consistent with *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), is irrelevant because the decision below applied a standard that was at least as stringent as the standard called for in *Firestone*. *Firestone* holds that when ERISA claim administrators with discretionary authority also labor under a conflict of interest, the conflict is "weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" *Firestone*, 489 U.S. at 115. In this case, the Ninth Circuit assumed that a conflict existed, applied a heightened and skeptical review of the record as a result of the conflict, and concluded that the record did not reveal any abuse of discretion. (App. 5[1], citing *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006).)

Baida's second argument, that review is warranted in light of this court's upcoming decision in *MetLife (Metropolitan Life Insurance Company) v. Glenn*, 128 S. Ct. 1117 (2008), is also meritless. In *Glenn*, this court certified two questions for review: (1) whether the fact that an ERISA claim administrator is also the funding source for benefits constitutes a conflict of interest; and (2) how a conflict should be

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[1] References are to Appendix to Petition for Writ of Certiorari.

taken into account on judicial review of a discretionary benefits decision. Here, the Ninth Circuit treated Unum as a conflicted claim administrator and still ruled in its favor, making the first question in *Glenn* irrelevant to this case. Moreover, the second question is also irrelevant, because the heightened degree of scrutiny applied to Unum's decision in this case is at least as unfavorable to Unum as the levels of judicial review proposed by both the respondent and the United States in *Glenn*. In short, unless this court takes a position in *Glenn* that goes beyond the positions of the respondent and the government in that case, essentially wiping out discretionary review in the insured benefit plan context, further review in this case would be pointless.

Finally, given the evidentiary record and the detailed findings by the district court in this case, if Unum had a conflict of interest, such a conflict did not affect the benefit determination and there is no reason for this court to review the conflict of interest issue. The evidentiary record shows that Unum gave Baida (and her attorneys) multiple opportunities to submit information to support her claim and even sought to investigate an alternate potential basis for her claim. Unum thoroughly reviewed and considered all of the information submitted by Baida and it obtained independent medical reviews of the claim by a qualified specialist. Accordingly, there is no reason for this court to address the conflict of interest issue in this case and the petition should be denied.

JURISDICTION

This court has discretionary jurisdiction to review decisions by the federal courts of appeals. 28 U.S.C. § 1254(1). For the reasons set forth herein, Respondents submit that this court should not exercise that jurisdiction.

COUNTERSTATEMENT OF THE CASE

Factual Findings[2]

Baida submitted a claim for total disability benefits in September 2000 to the Plan maintained by her employer and funded by a group disability insurance policy issued by Unum. She claimed that she had been diagnosed with lupus and that she was totally disabled from her work as a senior account executive at a public relations firm (Porter Novelli) in New York City due to symptoms of rash, arthritis, and fatigue, which she attributed to lupus. Baida relocated from New York to California and her attending physician opined that Baida would be disabled from her usual work for three months. (She was twenty-nine years old at the time of the submission of her claim.) (R. App. 3.)

The Plan defines "total disability" as being "limited from performing the material and substantial

[2] The district court's findings of fact are attached in Respondents' Appendix ("R. App.").

duties of your regular occupation due to your sickness or injury" and having "a 20% or more loss in your indexed monthly earnings due to the same sickness or injury." If the insured is able to work part-time, the policy provides for partial disability benefits based on loss of income. The Plan also provides that a disability period ends when "you are able to work in your regular occupation on a part-time basis but you choose not to." Finally, the Plan defines "regular occupation" as "the occupation you are routinely performing when your disability begins. Unum will look at your occupation as it is normally performed in the national economy, instead of how the work tasks are performed for a specific employer or at a specific location." (R. App. 2.)

Based on an initial nurse review, Unum began payment of Baida's claim following the ninety-day elimination period required by the policy and determined that it would conduct a further evaluation after several months.

In August 2001, a further medical review determined that updated records were needed from Baida's attending physician, as well as records of psychiatric treatment referenced in the medical records. In response to Unum's request for psychiatric records, the only "record" received was a letter co-authored by Baida's treating psychologist and psychiatrist. Although the letter noted that Baida had been seen for therapy in thirty-one sessions and for medication management about six times, no records of any treatment were provided. (R. App. 4.)

The following month Baida and Unum began discussing the possibility of Baida's returning to work in 2002. Unum assisted Baida in drafting a proposal for freelance employment and communicated with her attending physician, Eugene Boling, M.D., to obtain his input regarding occupational rehabilitation. A further medical review concluded that Baida's records did not support any significant limitations and that Baida should be able to participate in a return-to-work program. (R. App. 5.)

On or about January 18, 2002, Unum received a letter and an Estimated Functional Abilities Form from Baida's treating physician, Dr. Boling, who approved Baida's participation in the return-to-work program. Dr. Boling agreed with Unum's suggestion that Baida begin working three five-hour days and then gradually increase to eight-hour days. He submitted a form stating that Baida could perform four hours of sedentary activity, two hours of light activity and two hours of medium activity in a work day. (R. App. 5.)

Baida received benefits during her participation in the return-to-work program from January 2002 to July of 2002. At the end of that period, she said that she had performed "freelance p.t. [part-time] work (when available)," but that her physical and mental limitations did not allow for full-time work, and that having good and bad days made it difficult to keep a schedule. An accompanying medical record note from Dr. Boling revealed that Baida had just married and taken a one-week honeymoon to Jamaica. It also noted

that she had been stressed in part by "trying to start up some business through home." Dr. Boling went on to note: "Is having ongoing joint pain, but has been able to get back to doing work at home, although at limited hours of 10-12 hours per week." Dr. Boling submitted another form, again stating that Baida could perform four hours of sedentary activity, two hours of light activity and two hours of medium activity in a work day. (R. App. 5-7.)

Unum had the new claim documents reviewed by its Medical Director, Tanya Mack Horne, M.D. Dr. Horne opined that, although Baida experienced periods of fatigue, her ability to work at home should allow her to pace herself and rest as needed. She noted that Baida's restrictions and limitations had not changed since January 2002, when her physician approved her participation in the return-to-work program. Unum also had Baida's new claim reviewed by a rehabilitation counselor who opined that Baida would be able to perform her occupational duties within the restrictions and limitations presented by her attending physician.

Based on the medical and vocational reviews, Unum advised Baida that it had determined that she was no longer entitled to benefits. Unum also informed Baida that if she wished to appeal the denial of her claim, she should submit a written request and any new information she would like considered within ninety days. (R. App. 7.)

Baida appealed the denial of her claim and submitted a new form from Dr. Boling stating that she was limited to only four hours of sedentary activity per day and no more than fifteen hours per week. The appeal documents were reviewed by Medical Director Dr. Horne who found no basis for Dr. Boling's change in opinion that Baida could not perform light or moderate activity, when he had previously opined on two occasions that she could perform up to four hours of light/moderate activity, in addition to four hours of sedentary activity. (R. App. 8.)

Upon review of the appeal by its Quality Performance Support Unit, Unum decided to have Baida's claim reviewed by an independent rheumatologist.[3] It informed Baida that an independent review would be conducted and it sought the opinion of an independent rheumatologist, Micha Abeles, M.D. (Dr. Abeles is an Associate Professor of Medicine at the University of Connecticut, a fellow of the American Board of Rheumatology, and has published extensively regarding rheumatological conditions, including lupus and fibromyalgia.) Dr. Abeles reviewed the medical information and opined that Baida's claim of total disability was not supported. Specifically, Dr. Abeles found: "Ms. Rice[4] appears to be a patient with a functional somatic disorder. . . . There

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[3] Unum also provided Baida with a complete copy of her disability claim file and a copy of the group LTD policy at her request.

[4] Prior to her marriage, Baida was known as Joanna Rice.

is no evidence for active SLE[5]. . . . There is no evidence in the clinical notes that allow an objective reader to conclude that disability exists. Complaints of fatigue are the patient's major complaint; yet, fatigue is not presently addressed (*e.g.*, by psychiatric evaluation, use of anti-depressants such as SSRIs, or use of energizing medications as Provigil)." Dr. Abeles also noted that there was no evidence of a current SLE diagnosis. With regard to the limitations provided by Dr. Boling, Dr. Abeles stated: "Dr. Boling does fill out an estimated function ability form. He eventually changes it. It's unclear how Dr. Boling was able to conclude the limitations he placed on Ms. Rice from his notes. There is no documentation that indicates any major functional process problem." (R. App. 9.)

On March 14, 2003, Unum advised Baida that her appeal was denied because the information gathered on her claim, including the report of Dr. Abeles, indicated that she was not totally disabled under the terms of her policy. Unum also noted that while it had requested psychiatric treatment records several times, such records had never been received. Finally, Unum advised Baida that it would forward Dr. Abeles' report to her treating physician, Dr. Boling.

At Baida's request, Unum agreed to provide an extension of time for Baida to provide additional

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[5] SLE refers to systemic lupus erythematosus.

information for further consideration. Baida retained counsel and submitted a further appeal on May 30, 2003. Included with this second appeal was a letter from Dr. Boling stating, for the first time, that the forms he had submitted in January 2002 and July 2002 were incorrect and that although he had previously stated that Baida could engage in four hours of sedentary activity, two hours of light activity and two hours of medium activity daily, he had actually meant that she could engage in four hours of sedentary activity only. Dr. Boling also responded to Dr. Abeles' report and opined that Baida could not work "full time in her fast-paced occupation." However, he also opined that Baida could work part-time and that "Joanna's freelancing work is well-suited to her limitations, since she can control her workload and work from home, resting as needed." Baida's second appeal also included a report from Daniel Wallace, M.D., which was based on a single visit with Baida. Dr. Wallace opined that Baida had SLE, severe fibromyalgia, and steroid dependence and that she was disabled due to the effects of her treatment. Dr. Wallace also opined that Baida had a "labile emotional state." (R. App. 10-11.)

The additional medical information submitted by Baida was sent to the independent rheumatologist, Dr. Abeles, for further review, but Dr. Abeles did not find the new information to be supportive of total disability. Medical Director Dr. Horne also reviewed the information and opined that Dr. Abeles had made valid and reasonable findings. (R. App. 11.)

Prior to the second appeal, Baida also submitted a brief letter from a treating psychologist, Enid Richey, Ph.D., who opined that Baida had Major Depression and Anxiety. No treatment records were sent with the psychologist's one-paragraph letter, although those records had previously been requested. Despite the failure to provide treatment records, Unum referred Dr. Richey's letter, along with the letter previously received from Baida's psychologist and psychiatrist in October 2001, to Thomas M. Pendergrass, R.N., Ph.D., for review. Dr. Pendergrass found that the available data did not suggest or describe psychiatrically based restrictions and limitations. (R. App. 11-13.)

After these reviews, Unum advised Baida of its determination that its prior decision was appropriate and that her second appeal was denied. Unum explained that the additional medical information provided had been reviewed and evaluated but that the information submitted did not support a claim of total disability. Unum again invited Baida to provide the missing records pertaining to her psychiatric/psychological treatment and it advised her that it would keep her claim open for another 30 days to give her the opportunity to provide that information. (R. App. 12.)

Baida's counsel and Dr. Wallace submitted further correspondence disagreeing with Unum's decision, but no records regarding mental health treatment were provided. Further medical and psychological reviews were conducted to address the

correspondence received from Baida's counsel and Dr. Wallace. However, the reviews did not find any basis to alter the decision on Baida's claim. The medical review indicated that Dr. Wallace's notes seemed to "focus on the insured's psychological response to her steroid therapy." However, no records had ever been submitted to support a psychological aspect to Baida's claim and a review by Psychologist Dr. Pendergrass noted that the limited information provided did not support a claim of disability.

On September 30, 2003, Baida was advised, through her counsel, that Unum's decision remained unchanged and that the denial of the claim had been upheld. On October 29, 2003, Baida's counsel submitted a copy of a Social Security Notice of Award letter. No further information regarding the basis for the award was provided and Unum did not change its decision. (R. App. 12-13.)

Proceedings Below

Baida filed an action for judicial review of Unum's benefit determination pursuant to ERISA, 29 U.S.C. § 1132(a)(1)(B). Because the benefit plan granted discretion to Unum to make the determination at issue, the district court ruled that it would apply a deferential standard in reviewing Unum's determination. (App. 13 (denying Baida's motion for *de novo* review).) However, applying *Firestone,* the district court also noted:

> "[I]f a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'"

(App. 12 (*quoting Firestone Tire & Rubber Co.*, 489 U.S. at 115, *quoting* Restatement (Second) of Trusts § 187, Comment d (1959)).)

In the courts of the Ninth Circuit, as elsewhere, many ERISA benefit disputes involving an abuse of discretion standard of review are decided based on cross-motions for summary judgment. *See, e.g., Jordan v. Northrop Grumman Corp. Welfare Benefit Plan*, 370 F.3d 869 (9th Cir. 2004), *Alford v. DCH Foundation Group Long Term Disability Plan*, 311 F.3d 955 (9th Cir. 2002), *Desrosiers v. Hartford Life and Acc. Co.*, 515 F.3d 87 (1st Cir. 2008), *Williams v. Aetna Life Ins. Co.*, 509 F.3d 317 (7th Cir. 2007). However, in this case, the district court denied the parties' cross-motions for summary judgment, finding that there were triable issues of fact with respect to whether Unum abused its discretion. The district court then considered the parties' trial briefs and conducted a bench trial during which the court asked multiple questions of both parties over approximately three hours. The district court then made detailed factual findings and determined that Unum's decision that Baida was not disabled was supported by the record and did not constitute an abuse of discretion. (App. 16.)

The Ninth Circuit affirmed in an unpublished decision filed on December 20, 2007.[6] The court held that the abuse of discretion standard of review applied pursuant to *Firestone Tire & Rubber Co. v. Bruch*, *supra*, 489 U.S. 101, 115 and *Abatie v. Alta Health & Life Ins. Co.*, *supra*, 458 F.3d 955, 963. (App. 2-3.) The court also assumed that Unum had a conflict of interest by virtue of its dual role as plan insurer and decision maker and held that the district court's review was sufficient even if the court applied "the more heightened, skeptical abuse of discretion review required by *Abatie,*" which holds "that the abuse of discretion standard of review will be more skeptical when a conflict of interest or procedural violation is involved." (App. 5 (citing *Abatie*, 458 F.3d at 967-68).) The court further concluded that "[t]he record demonstrates that the district court carefully considered the facts and circumstances of the case before adopting its findings of fact. Additionally, Baida has not demonstrated any clear error in the district court's factual findings." (App. 6.)

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[6] The Ninth Circuit noted that its disposition "is not precedent except as provided by 9th Cir. R. 36-3," which provides in pertinent part "[u]npublished dispositions and orders of this court are not precedent except when relevant under the doctrine of the law of the case or rules of claim preclusion or issue preclusion." (App. 1.)

REASONS FOR DENYING THE PETITION

A. The Standard Applied By The Ninth Circuit Is Not Inconsistent With *Firestone*

In *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006) (*en banc*), the Ninth Circuit held that (a) there is an inherent conflict of interest where a claim administrator fulfills dual roles as decision maker and as payer of benefits; and (b) a reviewing court should consider this conflict, as well as other surrounding circumstances, when determining how much deference to grant to the decision under review. *Id.* at 967-68. *Abatie* rejected, as did this court in *Firestone, supra,* any rule that would cause the judicial review standard to default to *de novo* in the face of such a conflict. *Id.* In the present case, the Ninth Circuit applied *Abatie,* although that case was not decided until after the district court ruling.

The standard applied by the Ninth Circuit is at least as stringent as the standard required by *Firestone.* In *Firestone*, this court held that the conflict of interest "must be weighed" as a factor in determining whether a claim administrator's decision constitutes an abuse of discretion. *Firestone*, 489 U.S. at 115. The Ninth Circuit applied *Abatie*, *supra*, and held that *Abatie* called for a "more heightened, skeptical abuse of discretion review" than would otherwise apply in the absence of a presumed conflict. (App. 5 (citing *Abatie*, 458 F.3d at 967-968).) It determined: "[t]he record demonstrates that the district court carefully considered the facts and circumstances of the case

before adopting its findings of fact" and that the district court's review satisfied the heightened level of review requirement set forth in *Abatie*. (App. 5-6.)

The Ninth Circuit's decision is supported by the record, which documents the extensive review conducted by the district court in this case. In many cases governed by ERISA, judicial review involves consideration of simultaneously filed opening and responsive briefs. In contrast, the district court reviewed nine briefs and supporting documents (including evidence outside the administrative record) pertaining to the parties' cross-motions for summary judgment, heard argument on those cross-motions, considered trial briefs filed by the parties and conducted extensive questioning of both counsel regarding their clients' respective positions over the course of the bench trial. The district court demonstrated that it reviewed the record with a peeled judicial eye and its extensive review led it to conclude that Unum's decision was supported by the evidence and did not constitute an abuse of discretion. *See Rush Prudential HMO, Inc. v. Moran,* 536 U.S. 355, 384 n. 15 (2002). The Ninth Circuit ruled that the record supported the district court's decision and showed that Unum had engaged in an "ongoing, good faith exchange of information" with Baida. (App. 5 (citing *Jebian v. Hewlett-Packard Co. Employee Benefits Or. Income Prot. Plan*, 349 F.3d 1098, 1107 (9th Cir. 2003).) Given that the standard applied in this case was at least as stringent as the *Firestone* standard, and that the Ninth Circuit still held that Unum's

decision was not an abuse of discretion, the decision below was not inconsistent with *Firestone*, or if it was, any error was harmless and there is no basis for review by this court.

B. Review Is Not Required Because Of This Court's Pending Decision In *MetLife v. Glenn*

Baida's second argument, that certiorari is warranted to address issues already under consideration in *MetLife (Metropolitan Life Insurance Company) v. Glenn*, 128 S. Ct. 1117 (2008), is also meritless.

This court certified two questions for review in *Glenn*: (1) whether the fact that an ERISA claim administrator is also the funding source for benefits constitutes a conflict of interest; and (2) how a conflict should be taken into account on judicial review of a discretionary benefits decision. This case is not an appropriate vehicle for certiorari on either issue.

With respect to the first question in *Glenn*, after *Abatie* the Ninth Circuit presumes the existence of a conflict where the decision maker also pays claims out of its own pocket. In those situations, the decision of a claim administrator is viewed with skepticism. *Abatie*, *supra*, 458 F.3d at 968. Pursuant to *Abatie*, the Ninth Circuit treated Unum as a conflicted administrator and applied the heightened degree of scrutiny required by *Abatie*. (App. 2 (referring to "Unum's inherent, structural conflict of interest of both making decisions on claims and paying claims with its own funds").) In deciding *Glenn*, this court may or

may not presume the existence of a conflict. However, because the Ninth Circuit presumed the existence of a conflict in this case and ruled in favor of Unum anyway, this court's decision with respect to the first issue in *Glenn* will have no impact on the result in this case.

With respect to the second question certified in *Glenn*, both the respondent and the United States, in support of the respondent, cite to *Abatie* as consistent with this court's mandate in *Firestone* and as a standard that allows for consideration of a conflict of interest without disregarding the discretionary authority granted to claim administrators. *Abatie* is cited by the respondent in *Glenn* as providing a "useful analytical structure" to determine the degree of scrutiny required in cases involving conflicted claim administrators. (*See Glenn* Respondent's Brief, 2008 WL 809104 at *48.) *Abatie* is cited by the United States to support its contention that the appropriate standard of review to be applied to decisions made by conflicted claim administrators may involve careful scrutiny. (*See Glenn* U.S. Brief, 2008 WL 859356 at *26-*27.) Specifically, the United States cites to *Abatie*'s holding that "'[a]buse of discretion review applie[s] to a discretion-granting plan even if the administrator has a conflict of interest,' but that review must be 'informed by' the administrator's conflict of interest." (*Id.* at *26, quoting *Abatie*, *supra*, 458 F.3d at 965.)

In the present case, both the district court and the Ninth Circuit applied the "more heightened, skeptical abuse of discretion review" required by *Abatie* and advocated by the respondent and the

United States for adoption by this court in *Glenn*. While Unum contends that the *Abatie* standard should not guide the result in *Glenn,* the fact is that in this case the Ninth Circuit applied a review standard that met or exceeded the standard argued by the respondent and the United States in *Glenn* and still found in Unum's favor. Unless this court adopts an even stricter standard, the decision in *Glenn* will not have any impact on the result in this case.[7]

Finally, the conflict of interest issue under review in *Glenn* is nothing more than a red herring in this case because, regardless of how the deferential review standard is affected by such a conflict, it will not change the result in this case. Both the district court and the Ninth Circuit applied a thorough and skeptical review of the record and both ruled that their review showed that the decision on Baida's claim was well supported and that Unum had not abused its discretion. The decision that Baida was not disabled was supported by the opinion of an independent Board-certified rheumatologist and withstood a heightened degree of scrutiny. Baida and her counsel were given ample opportunity to submit information in support of her claim and Unum properly considered and evaluated all of the information submitted

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[7] A more stringent standard would essentially wipe out deferential review in the face of a structural conflict of interest. This is exactly the position that the Third Circuit took in *Firestone*. This Court expressly rejected such a position when it overturned that decision. 489 U.S. at 115.

on the claim. Indeed, the record shows that rather than evincing a bias in favor of denial, Unum attempted (repeatedly) to obtain the records from Baida's mental health treatment to determine if there was an alternative basis for her claim; it was prevented from doing so by Baida's refusal to release her records. Accordingly, this case does not warrant review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

EDITH SANCHEZ SHEA
Counsel of Record
BURKE, WILLIAMS & SORENSEN, LLP
444 South Flower Street
Suite 2400
Los Angeles, CA 90071-2953
Telephone: (213) 236-0600

DONALD J. SAPALA
FIRST UNUM LIFE INSURANCE COMPANY
1 Fountain Square
Chattanooga, TN 37402
Telephone: (423) 294-4479

MARK E. SCHMIDTKE
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
20 South Clark Street
Chicago, IL 60603
Telephone: (312) 558-1220

Counsel for Respondents

GALTON & HELM LLP
ROBERT F. KEEHN, State Bar No. 115848
EDITH S. SHEA, State Bar No. 177578
KEIKO J. KOJIMA, State Bar No. 206595
500 South Grand Avenue, Suite 1200
Los Angeles, California 90071-2624
Telephone: (213) 629-8800
Facsimile: (213) 629-0037

Attorneys for Defendants
First UNUM Life Insurance Company and
Diversified Agency Services Group Benefit Plan

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA,
WESTERN DIVISION

JOANNA BAIDA, Plaintiff, vs. FIRST UNUM LIFE INSURANCE COMPANY, et al., Defendants.	CASE NO. CV 03-9345 GPS (CWx) [Transferred to Judge George P. Schiavelli] ~~[PROPOSED]~~ FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT (Filed Nov. 22, 2005)

FINDINGS OF FACT

1. Diversified Agency Services Group Benefit Plan is an employee welfare benefit plan, sponsored by Omnicom Management Inc. The Plan was funded in part by a group contract of long-term disability insurance, Policy No. 548712001, issued to Omnicom

Management Inc. by UNUM. (Administrative Record ["A.R."] UASP00055-UASP00001)

2. The Plan provides disability benefits of 60% of monthly earnings, up to a maximum of $15,000 per month. The Plan also provides that benefits will be reduced by deductible sources of income, including Social Security disability income benefits. For disabilities beginning before the age of 60, the maximum benefit period is to age 65. However, "[d]isabilities due to mental illness have a limited pay period up to 24 months." (A.R. UASP00035)

3. The Plan defines "total disability" as being "limited from performing the material and substantial duties of your regular occupation due to your sickness or injury" and having "a 20% or more loss in your indexed monthly earnings due to the same sickness or injury." (A.R. UASP00040)

4. If the insured is able to work part-time, the policy provides for partial disability benefits based on loss of income. (A.R. UASP00039)

5. The Plan provides that a disability period ends when "you are able to work in your regular occupation on a part-time basis but you choose not to." (A.R. UASP00035)

6. "Regular Occupation" is defined as "the occupation you are routinely performing when your disability begins. UNUM will look at your occupation as it is normally performed in the national economy, instead

of how the work tasks are performed for a specific employer or at a specific location." (A.R. UASP00022)

7. The Plan provides that "[w]hen making a benefit determination under the policy, UNUM has discretionary authority to determine your eligibility for benefits and to interpret the terms and provisions of the policy." (A.R. UASP00020, UASP00044)

8. BAIDA submitted a claim for total disability benefits in September 2000. She claimed that she had been diagnosed with lupus in 1997 and that she was totally disabled from her work as a senior account executive at a public relations firm (Porter Novelli) in New York City due to symptoms of rash, arthritis, and fatigue, which she attributed to lupus. BAIDA's attending physician, Lisa R. Sammaritano, M.D., opined that BAIDA would be disabled from her usual work until December of 2000. (A.R. UACL00002, UACL00011, UACL00010, UACL00161, UACL00016, UACL00013-UACL00012, UACL00009-UACL00004)

9. In October 2000, UNUM learned that BAIDA had relocated from New York City to Ontario, California. In a telephone interview, BAIDA told UNUM that her new doctor in California, Kenneth Kalunian, M.D., was reducing her medications and wanted to take her off steroids completely. (A.R. UACL00851-UACL00850)

10. As part of its investigation of the claim, UNUM obtained medical records from Dr. Kalunian and Dr. Sammaritano and from BAIDA's treating dermatologist, Dr. Howe. (A.R. UACL00019-UACL00028,

UACL00039, UACL00096-UACL00307, UACL00312-UACL00318)

11. An initial medical review indicated that the diagnosis of Systemic Lupus Erythomatosis (SLE) was supported by the clinical findings and it was recommended that records be obtained after four or five months to assess BAIDA's status. (A.R. UACL00334-UACL00332, UACL00326)

12. The recommendation to further evaluate the status of BAIDA's condition after several months was consistent with BAIDA's own treating physician's estimate that she would be able to return to work three months after filing her claim. (A.R. UACL00161)

13. Based on its initial medical review, UNUM began payment of BAIDA's claim following the 90-day elimination period required by the policy. (A.R. UACL00337-UACL00335)

14. BAIDA submitted supplemental claim statements and attending physician statements from Dr. Kalunian and UNUM continued to pay her claim. (A.R. UACL00359-UACL00357, UACL00374-UACL00370)

15. In August 2001, a further medical review was conducted and it was determined that updated records were needed from BAIDA's attending physician as well as records from psychiatric treatment referenced in the medical records. (A.R. UACL00388-UACL00390)

16. In response to UNUM's request for psychiatric records, the only "record" received was a letter, co-authored by Enid Richey, Ph.D. and John Ursino, M.D. Although the letter noted that BAIDA had been seen for therapy in 31 sessions and for medication management about six times, no records of any treatment were provided. (A.R. UACL00394-UACL00393)

17. In September 2001, BAIDA and UNUM began discussing the possibility of BAIDA's returning to work in 2002. (A.R. UACL00392, UACL00845, UACL00397)

18. In November 2001, Lady Jackson, UNUM's Senior Vocational Case Manager, spoke by telephone with BAIDA regarding her possible return to work. (A.R. UACL00401-UACL00399)

19. To facilitate an appropriate return to work program for BAIDA, UNUM contacted BAIDA's prior employer in New York to discuss freelance opportunities and assisted BAIDA in drafting a proposal for freelance employment with her former employer. (A.R. UACL00398, UACL00684, UACL00450-UACL00451, UACL00412-UACL00405, UACL00421)

20. UNUM also contacted BAIDA's newest attending physician, Eugene Boling, M.D., to obtain his input regarding occupational rehabilitation. (A.R. UACL00433)

21. A further medical review on December 14, 2001 indicated that the current medical records did not

support any significant physical or psychiatric limitations and that BAIDA should be able to participate in a return-to-work program. (A.R. UACL00419-UACL00418)

22. On or about January 18, 2002, UNUM received a letter and Estimated Functional Abilities Form from BAIDA's treating physician, Dr. Boling, who opined that BAIDA's symptoms were attributable to both SLE and fibromyalgia, but approved BAIDA's participation in the return-to-work program. (A.R. UACL00524-UACL00523, UACL00527, UACL00525-UACL00526)

23. Dr. Boling agreed with UNUM's suggestion that BAIDA begin working three five-hour days and then gradually increase to eight-hour days. (A.R. UACL00527)

24. The form submitted by Dr. Boling indicated that BAIDA could perform four hours of sedentary activity, two hours of light activity and two hours of medium activity in a work day. (A.R. UACL00526)

25. At the end of January 2002, UNUM and BAIDA reached an agreement whereby she would receive benefits for six months, through June 30, 2002, during which time she would participate in a return-to-work program. Under the agreement, if BAIDA wanted to continue her claim of disability after June 2002, she would notify UNUM and her claim would be considered. (A.R. UACL00679-UACL00677)

26. In July 2002, BAIDA requested that her claim be reopened. BAIDA said that she had performed "freelance p.t. work (when available)," but that her physical and mental limitations did not allow for full time work, and that having good and bad days made it difficult to keep a schedule. (A.R. UACL00547, UACL00543, UACL00546, UACL00549, UACL00545)

27. An accompanying medical record note from Dr. Boling revealed that BAIDA had just married and taken a one-week honeymoon to Jamaica. It also noted that she had been stressed in part by "trying to start up some business through home." Dr. Boling went on to note: "Is having ongoing joint pain, but has been able to get back to doing work at home, although at limited hours of 10-12 hours per week." (A.R. UACL00545)

28. Dr. Boling submitted another Estimated Functional Abilities Form, again, indicating that Badia could perform four hours of sedentary activity, two hours light activity and two hours of medium activity in a work day. (A.R. UACL00549)

29. UNUM had the new claim documents reviewed by medical consultant Janet Shepard, R.N. and by Medical Director Tanya Mack Horne, M.D. The review of the records reflected that BAIDA's restrictions and limitations had not changed since January 2002, when her physician approved her participation in the return-to-work program. Dr. Horne opined that although BAIDA experienced periods of fatigue, her ability to work at home would allow her to pace

herself and rest as needed (A.R. UACL00552-UACL00551, UACL00555-UACL00553)

30. UNUM also had BAIDA's new claim reviewed by Rehabilitation Counselor G. Shannon C'Kelley, M.Ed., who opined that BAIDA would be able to perform her occupational duties within the restrictions and limitations presented by her attending physician. (A.R. UACL00556-UACL00559)

31. Based on the opinions of the medical and vocational reviewers that BAIDA's claimed limitations were not sufficient to render her totally disabled from her occupation and that her limitations could be accommodated so that she could continue to work, BAIDA's claim for continued total disability benefits was denied. UNUM advised BAIDA of the denial in a letter dated September 23, 2002. The letter advised BAIDA that if she wished to appeal the denial of her claim, she should submit a written request and any new information she would like considered within ninety days. (A.R. UACL00563-UACL00561)

32. On October 21, 2002, BAIDA appealed the denial of her claim. With her appeal, BAIDA submitted a new Estimated Functional Abilities Form completed by Dr. Boling which indicated that BAIDA was limited to only four hours of "sedentary activity" per day or no more than 15 hour weeks. (A.R. UACL00572-UACL00566)

33. The appeal documents were reviewed by Dr. Horne, who found no basis for Dr. Boling's change in opinion that BAIDA could not perform light or

moderate activity, when he had previously opined on two occasions that she could perform up to four hours of "light/moderate" activity, in addition to four hours of "sedentary activity." (A.R. UACL00578-UACL00574)

34. In a letter dated November 13, 2002, UNUM advised BAIDA that the information she had submitted did not appear sufficient to reverse the decision on her claim, but that her file had been sent to the Quality Performance Support Unit for further appellate review. (A.R. UACL00579)

35. Upon further review, UNUM decided to have BAIDA's claim reviewed by an independent rheumatologist and it informed BAIDA that an independent review would be conducted. (A.R. UACL 00605)

36. UNUM also provided BAIDA with a complete copy of her disability claim file and a copy of the group LTD policy at her request. (A.R. UACL00602, UACL00603, UACL00605)

37. UNUM then sought the opinion of an independent rheumatologist, Micha Abeles, M.D. (A.R. UAIA 00005-UAIA 00007)

38. Dr. Abeles is an Associate Professor of Medicine at the University of Connecticut, a fellow of the American Board of Rheumatology, and has published extensively regarding rheumatological conditions, including lupus and fibromyalgia. (A.R. UACL00663-UACL00638)

39. Dr. Abeles reviewed the medical information and opined that BAIDA's claim of total disability was not

supported. Specifically, Dr. Abeles found: "Ms. Rice appears to be a patient with a functional somatic disorder . . . There is no evidence for active SLE. . . . There is no evidence in the clinical notes that allow an objective reader to conclude that disability exists. Complaint of fatigue are the patient's major complaint; yet, fatigue is not presently addressed (*e.g.*, by psychiatric evaluation, use of anti-depressants such as SSRIs, or use of energizing medication as Provigil." (A.R. UACL00771-UACL00768, UACL00663-UACL00638)

40. Dr. Abeles also noted that there was no evidence of a current SLE diagnosis. (A.R. UACL 00769)

41. With regard to the limitations provided by Dr. Boling, Dr. Abeles stated: "Dr. Boling does fill out an estimated function ability form. He eventually changes it. It's unclear how Dr. Boling was able to conclude the limitations he placed on Ms. Rice from his notes. There is not documentation that indicates any major functional process problem. There is also nothing documented in Dr. Boling's notes that warrants him changing his evaluation." (A.R. UACL00769)

42. On March 14, 2003, UNUM advised BAIDA that its earlier decision denying benefits was affirmed and that her appeal was denied. UNUM explained that based on an evaluation of all of the information gathered on her claim, including the report of Dr. Abeles, it appeared that she was not totally disabled under the terms of her policy. UNUM also noted that while it had requested psychiatric treatment records several times, such records had never been

received. UNUM also advised BAIDA that it would forward Dr. Abeles' report to her treating physician, Dr. Boling. (A.R. UACL00750-UACL00746, UACL00614-UACL00615)

43. At BAIDA's request, UNUM agreed to provide an extension of time until May 31, 2003 in which to provide additional information for consideration of her appeal. (A.R. UACL00624-UACL00623)

44. BAIDA retained counsel and submitted a further appeal on May 30, 2003. (A.R. UACL 00879-UACL00898)

45. This second appeal relied on letters provided to UNUM by BAIDA's treating rheumotologist, Dr. Boling, and from Dr. Daniel Wallace, another rheumotologist who had seen BAIDA for the first time after her claim was denied. The letters from Dr. Boling stated that the two initial Estimated Functional Abilities Forms he had previously submitted in January 2002 and July 2002 were incorrect and that although he had previously stated that BAIDA could engage in four hours of sedentary activity, two hours of light activity *and* two hours of medium activity, he had actually meant that she could engage in four hours of sedentary activity (with two of the four being light activity and the other two being medium activity). Dr. Boling also responded to Dr. Abeles' report. Dr. Boling opined that BAIDA could not work "full time in her fast-paced occupation." However, he also opined that BAIDA could work part-time and that "Joanna's freelancing work is well-suited to her

limitations, since she can control her workload and work from home, resting as needed." (A.R. UACL00823, UACL00825-UACL00828)

46. Dr. Wallace's report was based on his single visit/evaluation. In his report, and note following the report, he opined that BAIDA had SLE, severe fibromyalgia and steroid dependence and that she was disabled due to the effects of her treatment. Dr. Wallace also opined that Baida had a "labile emotional state." (A.R. UACL00855-UACL00857)

47. The additional medical information submitted was sent to the independent rheumatologist, Dr. Abeles, for further review. (A.R. UAIA 00013, UACL 00945)

48. Dr. Abeles did not find the new information to be supportive of total disability. (A.R. UACL 00954-UACL 00956)

49. UNUM's Medical Director, Dr. Horne, reviewed Dr. Abeles' report and found that Dr. Abeles had made valid and reasonable findings, and that it did not appear that Dr. Abeles' assessment had changed based on the additional information submitted. (A.R. UACL00963-UACL00961)

50. Prior to the second appeal, BAIDA also submitted a brief letter from clinical psychologist Dr. Richey stating that he was seeing BAIDA for psychotherapy, that her diagnoses were Major Depression and Anxiety, and that her emotional and psychological distress

were related to her physiological impairments. (A.R. UACL00948)

51. No treatment records were sent with the one-paragraph letter from Dr. Richey, although they had previously been requested. Dr. Richey's letter, along with the letter previously received from BAIDA's psychologist in October of 2001, were referred to Thomas M. Pendergrass, R.N., Ph.D., for review. Dr. Pendergrass found that the available data did not suggest or describe psychiatrically based restrictions and limitations. (A.R. UACL00950-UACL00949, UACL00952-UACL00953)

52. On August 8, 2003, UNUM advised BAIDA of its determination that its prior decision was appropriate and that her second appeal was denied. UNUM explained that the additional medical information provided had been reviewed and evaluated but that the information submitted did not support a claim of total disability. UNUM again invited BAIDA to provide the missing records pertaining to her psychiatric/psychological treatment. UNUM also advised BAIDA that her claim would remain open for *another* 30 days to give her the opportunity to provide that information. (A.R. UACL00977-UACL00972)

53. BAIDA's counsel and Dr. Wallace submitted further correspondence disagreeing with UNUM's decision, but no records regarding mental health treatment were provided. (A.R. UACL00980-UACL00979, UACL01068-UACL01064 and UACL01063-UACL01062)

54. Further medical and psychological reviews were conducted to address the correspondence received from BAIDA's counsel and Dr. Wallace. (A.R. UACL001087, UACL01089, UACL01088; UACL01091-UACL01090)

55. The reviews did not find any basis for an alteration of the decision on BAIDA's claim. The medical review indicated that Dr. Wallace's notes seemed to "focus on the insured's psychological response to her steroid therapy." (A.R. UACL01087, UACL01089, UACL01088)

56. No records had ever been submitted to support a psychological aspect to Baida's claim and a review by Psychologist Dr. Pendergrass noted that the limited information provided did not support significant treatment or symptoms. (A.R. UACL01091-UACL01090)

57. On September 30, 2003, BAIDA was advised, through her counsel, that UNUM's decision remained unchanged and that the denial of the claim had been upheld. (A.R. UACL01096-UACL01092)

58. On October 29, 2003, BAIDA's counsel submitted a copy of a Social Security Notice of Award letter. (A.R. UACL 01097-UACL11102)

59. No further information regarding the basis for the award was provided and UNUM's decision remained unchanged. (A.R. UACL01104-UACL01103)

CONCLUSIONS OF LAW

1. This Court has jurisdiction, pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1).

2. The Court reviews UNUM's benefit determination for abuse of discretion only, pursuant to its Order of April 28, 2005 denying Plaintiff's Motion for Summary Adjudication on the Standard of Review. (Attached hereto as "A.")

3. The Court's review of the decision on Plaintiff's claim under the abuse of discretion standard is limited to the Administrative Record. *See Mongeluzo v. Baxter Travel Long Term Disability Benefit Plan*, 46 F.3d 938, 944 (9th Cir. 1995); *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1090 (9th Cir. 1999).

4. "[I]t is an abuse of discretion for an ERISA plan administrator to make a decision without any explanation, or in a way that conflicts with the plain language of the plan, or that is based on clearly erroneous findings of fact." *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1323-24 (9th Cir. 1995).

5. However, "review under the 'clearly erroneous' standard is significantly deferential, requiring a 'definite and firm conviction that a mistake has been committed.'" *Concrete Pipe & Products, Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 623, 113 S.Ct. 2264, 2280, 124 L.Ed.2d 539, 564 (1993). "[T]hat standard certainly does not permit the overturning of a decision where there is substantial evidence to support the decision, that is, where there is 'relevant

evidence [that] reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence.'" *Snow v. Standard Insurance Company*, 87 F.3d 327, 331-32 (9th Cir. 1996) (*citing Maynard v. San Jose*, 37 F.3d 1396, 1404 (9th Cir. 1994)).

6. Although there must be some support for its decision, UNUM need not demonstrate the validity of its decision by a preponderance of the evidence. *See Voight v. Metropolitan Life Ins. Co.*, 28 F.Supp.2d 569, 576 (C.D. Cal. 1998) (*citing Sandoval v. Aetna Life & Casualty Ins. Co.*, 967 F.2d 377, 382 (10th Cir. 1992)). Instead, BAIDA must demonstrate not only that UNUM's decision was incorrect, but that it was unreasonable. *See Donato v. Metropolitan Life Ins. Co.*, 19 F.3d 375, 380 (7th Cir. 1994). *See also, Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1417 (9th Cir. 1991) (emphasis in original).

DATED: Nov. 21, 2005 /s/ George P. Schiavelli
UNITED STATES DISTRICT COURT JUDGE